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United States Supreme Court

OCTOBER TERM, 1915.

No. 847.

WILLIAM N. McFARLAND,
Supervisor of Public Accounts of Louisiana, and Others,
Appellants,

versus

THE AMERICAN SUGAR REFINING COMPANY,
Appellee.

Appeal from United States District Court,
Eastern District of Louisiana,
From Decree Granting Injunction.

Supplemental Brief on Behalf of W. N. McFarland and Others, Appellants.

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Supplemental Brief on Behalf of W. N. McFarland and Others, Appellants.

We discussed, in our original brief, those points wherein Act 10 was deemed invalid by the lower Court.

We shall devote this supplemental brief to a discussion of those points of attack on Act 10, which the lower Court passed over without notice.

The first of these points may be described in the following question:

Does It Violate the Guarantees of Due Process of Law, and of Equal Protection of the Laws, to Treat the Sugar Refining Business as Impressed With Public Interest?

Act 10 declares that the once private business of refining sugar has become impressed with a public interest.

Paragraphs V, VI and VII of the bill challenge this declaration as invasive of private rights of property.

Paragraph XI of the bill contains a description of complainant's business, and of the refining business in general, together with an account of the alleged workings of the law of supply and demand, as affecting the price of raw sugar, all intended to show that complainant is not monopolizing the refining business in Louisiana, and is not fixing the price of the raw sugar it buys, and is not buying its raw sugar at an unreasonably low price.

The answer of the defendants to Paragraph XI of the bill was in these words:

> "Complainant's lawful right to buy sugar, and to do business in Louisiana is, to no extent, hampered or restrained by said Act No. 10, the aim and purpose of said Act being to make impossible in said business the repetition of complainant's unlawful, dishonest and demoralizing record.
>
> "The fundamental economic law of supply and demand, laid down by complainant in this paragraph, and all other economic laws and conditions in the business of refining sugar in Louisiana, have, to a large extent, been suspended, or nullified, or reversed by complainant's monopoly.
>
> "Complainant cannot profit by its own wrong, or put the consequence of its wrong on the producers of raw sugar, by saying, as it does in this paragraph,

that they bring their sugar to market during the months of November and December, with a rush too great for the refining capacity, when said sugar could, but for complainant's wrong, have found a market as plantation granulated, or through a planter's refinery, or through the refineries at Sugarlands, at St. Louis, at Philadelphia, and even at New York, which complainant suppressed or boycotted away from the Louisiana market.

"It is misleading and deceptive for complainant to allege that, by reason of the alleged surplus of sugar sent by the Louisiana producers to market in the months of November and December, it has been necessary to reduce the price to cover storage charges, and the like; for all sugar, that which was refined as it came to market, as well as that stored, was subjected to the complainant's unvarying process of price-manipulation, as set forth in the letter from complainant's Vice-President to its President, quoted above, in paragraph XIV, as the settled policy of complainant in dealing with raw sugar."

"The above answers the four detailed reasons set forth by complainant why it has not profited by the aforesaid price-differential, but defendants believe and aver that complainant has made said price-differential at New Orleans enormously larger than was necessary to cover said pretended disadvantages, due to the alleged want of refinery-capacity."

The legislative declaration, that a public interest has attached to a business, is entitled to great weight. It is not conclusive, of course, for not even the police power may wantonly impair private rights. Such an exercise of the legislative discretion would seem to rest upon a presumption affirming the existence of the evil to be remedied, as well as the propriety of the remedy to be applied.

This was expressed in **Central Lumber Company vs. South Dakota, 226 U. S. 157 (57 L. Ed. 174)**, through Mr. Justice Holmes:

> "The Courts cannot review the economics or facts on which the Legislature of a State bases its conclusions that an existing evil should be remedied by an exercise of the police power. Central Lumber Co. vs. South Dakota, 226 U. S. 157 (33 Sup. Ct. 66; 57 L. Ed. 174)."

In **Munn vs. Illinois, 44 U. S. 113 (24 L. Ed. 77)**; **Brass vs. North Dakota, 153 U. S. 391 (38 L. Ed. 757)**, and **German Alliance Ins. Co. vs. Lewis, 233 U. S. 389 (58 L. Ed. 1011)**, the facts, supporting the legislative declaration of public interest, were merely **inferred** by the Courts, on the ground that "great opportunities for combination to raise and control * * * charges" existed.

If the existence of the facts justifying such a declaration may be **inferred by the Courts**, it should be easily within the province of the Legislature to actually declare the existence of such facts, reserving to the Courts their province of saying whether the Legislature has acted arbitrarily.

It is stated, in **American Live Stock Co. vs. Exchange (Ill.), 36 Am. St. Rep. 398 (18 L. R. A. 200)**, and in **Ladd vs. Southern Cotton Press, 53 Texas, 172**, that a legislative declaration, as to the existence of a public interest in a business, sought to be regulated, is vital and material.

It was with the view, therefore, of overcoming the presumption raised by Act 10 that the business of sugar refining is monopolized, that the complainant offers its explanations, in its bill, of how smoothly the course of trade runs in that business.

The bill signally fails to make out a case of the arbitrary conversion, by fiat, of a really private business, into a nominally public one. It signally fails to touch the issue of the monopolization of the business under consideration. It enters the vestibule of that issue, by setting up that the sugar refining business was, what every other business was, in its origin, a purely private business; and it descants upon the theoretical ascendancy of the law of supply and demand, but nowhere does it venture to explain what its own interferences with the law of supply and demand have been, or what has been the effect, upon the originally private character of the business, of its own growth and conduct therein.

There is nothing whatever in the bill which meets, or comes near meeting, such inferences here as those, which, in the **Munn, Brass** and **German Alliance Insurance Company cases,** were the basis or warrant for the assertion of the public interest.

The case for the existence of the public interest in the business of sugar refining might well rest, therefore, upon the failure of the complainant to sufficiently negative the presumption raised by the legislative declaration in Act 10—upon the complainant's failure to show that, in asserting there was a public interest in the refining business, because of the fact of the monopolization thereof, there had been an abuse by the Legislature of that reasonable discretion which must lie behind every valid exercise of the police power.

Needless as it is to look beyond this weighty presumption, and to consider the facts as to the monopolization of the industry, as shown in the answer herein, and in the legislative history of Act 10, we shall do so, very briefly.

We first call the attention of the Court to those facts, touched upon in our original brief in this cause, in connection with our discussion of the complainant's "unclean hands." That statement of the facts, which, as the Court will see, is greatly condensed, is of the fullest application here.

With reference to the same statement of facts, the Supreme Court of Louisiana has said, in **State vs. American Sugar Refining Company**, a recent, and, as yet, unreported case, wherein the State is endeavoring to enforce her anti trust laws against the complainant:

> "The allegations of the petition show that the defendant, from almost the time it entered the State up to the present time, has grossly, deliberately and persistently violated the public policy of the State by a monopoly of the sugar industry and trade; and that, in its unlawful operation, it has oppressed, and is oppressing, and will continue, if allowed to continue at all, to oppress an absolutely dependent public in its use of one of the necessary foodstuffs produced and for sale in the State."

It may be said that the history of the American Sugar Refining Company has been, during the period since its organization in 1891, the history of the sugar refining industry in Louisiana. As part of such history, leading up to the enactment of Act 10 by the Legislature of Louisiana, was the following finding, by the "Hardwick Congressional Committee, appointed by the House of Representatives, in the year 1911, with the Hon. T. W. Hardwick, of Georgia, as Chairman, to investigate the complainant's status in the sugar refining industry:

> "Indeed," says the report, "it seems to us that,

from its organization on January 10, 1891, until 1907, at least, almost every step in the industrial development of the American Sugar Refining Company was a well-considered part of a carefully planned campaign to secure and maintain a monopoly of the interstate trade in sugar, to obtain complete control thereof, and to forestall and destroy the remaining competition therein."

"Since 1907, new influences have controlled the company, and the testimony does not show a continuation of the policy in investing in competing concerns, and it is shown that some of the properties previously acquired have been sold.

"By the above statement, however, your committee does not wish to be understood as entertaining or expressing the opinion that, even since 1907, the American Sugar Refining Company is not existing in violation of the Anti-Trust Law."

Further on in the report it is said:

"So, early in 1892, within a little more than a year after its organization, the American Sugar Refining Company had practically destroyed all competition, and had a practically complete monopoly of the sugar refining business of the United States, controlling ninety per cent of the sugar refining industry."

Further on:

"From March, 1892, up to 1898, the industrial history of the company is simply a recital of threatened competitors forestalled or bought, of actual competitors, when they insisted upon entering the business, either controlled or acquired; of the organization of subsidiary companies and dependent companies, in the place of independent and active competitors; of a powerful monopoly, shrewdly organ-

ized, carefully operated and strongly maintained against all comers."

With regard to Louisiana, the report says this:

"It seems to your committee that the American takes every advantage of the Louisiana producer that the absence of strong competition enables it to take, as might be expected, and that its defense that at least the freight rate to New York (15 points) ought to be deducted from the New York price, for sugar sold at New Orleans, because its New Orleans factory will not refine much more than forty per cent of its purchases of Louisiana raw sugar, was disingenuous and unfair, when we realize that the American, in accordance with its general policy, only buys raw sugar at New Orleans in excess of its requirements for its New Orleans refinery when, in its judgment, raw sugar is a good purchase, and it will be profitable to hold it until the refinery can make a larger profit."

That publicists and political economists have taken "judicial cognizance" of the status of monopoly existing in the sugar trade, as a result of complainant's operations, is a fact of much significance in deciding whether the Legislature of Louisiana abused its discretion in deciding that a state of monopoly existed in that trade, necessitating special regulation. A quotation in **Prof. Ely's** book on **Monopolies and Trusts**, at **page 228**, indicates the well-recognized status of the complainant in the sugar trade, and outlines, with remarkable accuracy, in an article of so general a character, the methods with which complainant conducted its business in Louisiana, and which brought the public opinion of the State to demand the enactment of Act 10:

"The interest of all aggregations of capital in re-

straint of open, free competition in the purchase, manufacture, distribution, and final sale of the products of industry to consumers, is directly opposed to that of the producers of raw materials as well as that of those engaged in the varied branches of commerce which springs from the effort to satisfy their requirements.

"The cornerstone of all these combinations must be the control of the price of raw produce, and the extent of this restraint on prime markets is the measure of success in monopolizing any branch of trade. In the recent investigation of the Sugar Trust, Mr. Searles, its Secretary, testified that, by being the largest buyer, his company had been able to keep down the price of the raw sugar, and thus to make the refined article cheap to consumers and its manufacture profitable to the trust. In all instances where combinations of capital have seized upon and become possessed of the avenues of distribution, the segregated producers of the raw produce have been forced to sell their output at prices which more than counterbalance the 'little economies,' 'the aggregation of brains,' 'the introduction of improved methods,' and 'the cheapened supply to ultimate consumers.' Between these two extremes the margin of profit to the combinations has been sufficient to enrich their stockholders and to furnish a fund to prostitute law in the aggrandizement and perpetuation of their restrictions on commerce.

"The edict of the Tobacco Trust goes forth and the price for the tobacco crop responds. The Standard Oil Company makes the price of refined either up or down, and at the same time directs its purchasing agents what they shall pay for the crude supply. If competition enters the field for raw sugar, for leaf tobacco, or for crude oil, the whole machinery of the combinations who assume to be sugar, tobacco and oil is put in motion to drive out the intruders, and

this is usually accomplished by lowering ultimate markets and forcing prime markets to respond. Under all circumstances, the producers are made the beasts of burden, and the revenues rendered necessary in the subordination of legislation, in the prostitution of courts, and in the manipulation of distributive tolls, become taxes on the producers, and are assessed and collected through reduced prime markets."

Prof. Van Hise, in his work on industrial combinations, entitled **"Concentration and Control,"** lays it down, as a general rule, that control of markets in an industry, through a restraint upon trade, creates a public interest in such industry:

> "The law should declare that businesses which restrain trade, to such a degree as to control the market, by that fact become of public interest. No one can doubt that the greater corporations are just as much affected by the public interest as are the railroads. The United States Steel Corporation, the Standard Oil Company, the American Sugar Refining Company, producing commodities, some of which are required by the larger portion of the population have relations to the public as a whole. The principle has already been recognized by some common-law decisions, and, in consequence, one class of business, which earlier was regarded as purely private, has become a public utility. Elevating grain, as a result of a long contest, was declared to be affected with a public interest, and, therefore, under the same obligations as other public utilities."

It necessarily follows, if the foregoing doctrine be sound, that a Legislature, which may declare the existence of a public interest, because of warehousemen being able to oppress the public, may declare the same fact,

where refiners have acquired the same power for evil.

In **Montague on Trusts, page 183,** this statement of H. O. Havemeyer is quoted:

> " 'I will state broadly,' said Mr. Havemeyer, of the American Sugar Refining Company, 'that when a corporation is dealing particularly in things that are essentially to the benefit of mankind—clothing, fuel, oil, sugar, rice, food—anything which is peculiarly, as I have described it, of a **quasi**-public character, it would be beneficial to the public to have all these under governmental superintendence.' "

Mr. Havemeyer is shown by the record to have been the President of the American Sugar Refining Company (Record, p. 16); but, as we are dealing with legislation, and public history, we feel free to say, without citing a supporting page in the record, that Mr. Havemeyer was the brain and engineer of the American Sugar Refining Company during his lifetime, and that the above statement is entitled to the greatest weight, by reason of his intimate knowledge of the business referred to, and of his long control over it. This statement, alone, is a complete refutation of the American Sugar Refining Company's present insistence that its business is a sacredly private one.

It was quite relevant to the present issue for the State to allege and show (Record, p. 26) that the revelations, concerning the fraudulent practices of the American Sugar Refining Company in buying its raw sugar in Louisiana, took place in the suit wherein the Federal Government is prosecuting the company, under the Sherman law, and that, even under the menace of the penalties of the Sherman law in that suit, there was no explanation whatever

offered by the complainant company of these revelations (Record, p. 26).

It will be seen, from the statement attributed to Mr. Searles, the Secretary of the complainant company, in **Ely on Monopolies**, that he treats it as a matter of course that his company has been able to keep down the price of raw sugar. It was with special reference to that condition that Act 10 declared that a public interest had attached to the refining business.

Mr. Havemeyer, in his frequently-published testimony before the New York Investigating Committee, of which Senator Lexow was chairman, made this fact of the control of the price of sugar by the complainant company even plainer than Mr. Searles did. This testimony was as follows:

> "Q. When you sell in this country, you control the price?
> "A. Yes, sir.
> "Q. And it was organized, as I understand it, with a view of controlling the price and output to the people of this country?
> "A. That was one of the objects of consolidation.
> "Q. And you have succeeded in doing it?
> "A. Yes, sir.
> "Q. That was the principal object in organizing the American Sugar Refining Company?
> "A. It may be said that that was the principal object.
> "Q. To control the price?
> "A. Yes, sir."

The climax of these revelations, coming from the complainant company, as to its system in the using of its monopoly as a contrivance to defraud the producers of

raw sugar, is contained in a letter from the Vice-President of the company, W. B. Thomas, to Mr. Havemeyer, printed in the Record, at p. 46, and from which we take the following passage:

> "The American Sugar Refining Company has no doubt enabled its competitors to buy their raw sugars cheaper than they could have without its existence, and something is owed to us in the way of co-operation on the part of our competitors, to assist in getting our raw supply as cheaply as possible."

And then follows the whole crux and secret of the American Sugar Refining Company's life and goal:

> "In regard to the raw sugar end of the business, what we are after, of course, ultimately, is the margin between raw and refined. **It arouses much less opposition and occasions much less talk if the price of raw sugars is depressed than if the price of refined is advanced, and, if we can secure a reasonable profit through this method, it is better than getting it out of the advance in refined sugars.**"

It will be seen, therefore, that there was nothing arbitrary in the declaration of the Legislature that the sugar refining business had become impressed with a public interest.

The Authorities Supporting the Public Interest in the Refining Business.

The most recent case on the question of the right of the State to regulate a previously private business is the **Pipe Line case, 234 U. S. 561,** where the Court, through Mr. Justice Holmes, said, concerning a monopolized industry:

"Availing itself of its monopoly of the means of transportation, the Standard Oil Company refused, through its subordinates, to carry any oil unless the same was sold to it or to them, and through them to it, on terms more or less dictated by itself. In this way it made itself master of the fields without the necessity of owning them, and carried across half the continent a great subject of international commerce coming from many owners, but, by the duress of which the Standard Oil Company was master, carrying it all as its own. The main question is whether the act does, and constitutionally can, apply to the several constituents that then had been united into a single line."

* * * * * * * * *

"* * * Those lines that we are considering are common carriers now in everything but form. They carry everybody's oil to a market, although they compel outsiders to sell it before taking it into their pipes. The answer to their objection is not that they may give up the business, but that, as applied to them, the statute practically means no more than they must give up, requiring a sale to themselves before carrying the oil that they now receive. The whole case is that the appellees, if they carry, must do it in a way that they do not like. There is no taking, and it does not become necessary to consider how far Congress would subject them to pecuniary loss without compensation in order to accomplish the end in view. Hoke vs. United States, 227 U. S. 308, 323 (57 L. Ed. 523, 527; 43 L. R. A. [N. S.] 906; 33 Sup. Ct. Rep. 281; Ann Cas. 1913E, 905; Lottery Case (Champion vs. Ames), 188 U. S. 321, 357 (47 L. Ed. 492, 501; 23 Sup. Ct. Rep. 321; 13 Am. Crim. Rep. 561)."

The principle was likewise applied to the fire insurance business, in **German Alliance Ins. Co. vs. Lewis, 233**

U. S. 389, where it was said, through Mr. Justice McKenna:

"Is the business of insurance so far affected with a public interest as to justify legislative regulation of its rates? And we mean a broad and definite public interest. In some degree the public interest is concerned in every transaction between men, the sum of the transactions constituting the activities of life. But there is something more special than this, something of more definite consequence which makes the public interest that justifies regulatory legislation. We can best explain by examples. The transportation of property—business of common carriers—is obviously of public concern, and its regulation is an accepted governmental power. The transmission of intelligence is of cognate character. There are other utilities which are denominated public, such as the furnishing of water and light, including in the latter gas and electricity. We do not hesitate at their regulation, nor at the fixing of the prices which may be charged for their service. The basis of the ready concession of the power of regulation is the public interest. This is not denied, but its application to insurance is so far denied as not to extend to the fixing of rates. It is said the State has no power to fix the rates charged to the public by either corporations, or individuals engaged in a private business, and the 'test of whether the use is public or not is whether a public trust is imposed upon the property, and whether the public has a legal right to the use which cannot be denied'; or, as we have said, quoting counsel, 'whether the right to demand and receive service does not exist in the public, the correlative right of regulation as to rates and charges does not exist.' * * *

"Cases are cited which, it must be admitted, support the contention. The distinction is artificial. It

is, indeed, but the assertion that the cited examples embrace all cases of public interest. The complainant explicitly so contends, urging that the test it applies excludes the idea that there can be a public interest, which gives the power of regulation as distinct from a public use, which, necessarily, it is contended, can only apply to property, not to personal contracts. The distinction, we think, has no basis in principle [quoting and citing authorities], nor has the other contention that the service which cannot be demanded cannot be regulated."

Then the Court goes on to consider **Munn vs. Illinois**:

"The principle was expressed to be [referring to Munn vs. Illinois], quoting Lord Chief Justice Hale, 'that when private property is affected with a public interest, it ceases to be **juris privati** only, and it becomes 'clothed with a public interest when used in a manner to make it of public consequence and affect the community at large.' "

After considering **Munn vs. Illinois**, and **Brass vs. North Dakota**, the Court went on to say:

"The cases need no explanatory or fortifying comment. They demonstrate that a business, by circumstances and its nature, may rise from private to be of public concern, and be subject, in consequence, to governmental regulation. And they demonstrate, to apply the language of Judge Andrews in the Budd case, 117 N. Y. 27 (5 L. R. A. 559; 15 Am. St. Rep. 460; 22 N. R. 670), that the attempt made to place the right of public regulation in the cases in which it has been exerted, and of which we have given examples, upon the ground of special privileges conferred by the public on those affected, cannot be supported. 'The underlying principle is that busi-

ness of certain kinds holds such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation.' Is the business of insurance within the principle? It would be a bold thing to say that the principle is fixed, inelastic, in the precedents of the past, and cannot be applied, though modern economic conditions may make necessary or beneficial its application. In other words, to say that government possessed at one time a greater power to recognize a public interest in a business and to regulate it for the promotion of the general welfare than government possesses to-day."

In **Eddy on Combinations, Sections 1048 and 1049**, the question of the right of the State to protect itself against the price-manipulations of a supposedly private business is considered academically:

"But, aside from the economic results of an arbitary advance of prices to an abnormal level, the question whether or not any party who finds himself immediately and disastrously affected by such arbitrary advance of prices has a remedy at law or in equity, is most interesting. It seems to be generally assumed that there is no remedy; that a combination, like an individual or a partnership or a corporation, may sell its goods at such prices as it pleases, and unless the combination is itself illegal, or unless some statutory provision controls, it may charge whatever price it pleases. If this impression be sound, the law is hopelessly inadequate to meet developing conditions, for it involves the conclusion that any man or body of men may obtain the absolute control of any particular industry and arbitrarily bring that industry to a standstill by ceasing absolutely to produce, or ruin those who are dependent upon the industry by arbitrarily advancing prices to

such a point that it is impossible for any one to deal with the combination and to do business at a profit. Whether or not an individual either could or would be permitted to do these things need not be discussed, for the possibility is too remote. An individual may control industries which are so small and unimportant that the action of the individual affects the community very slightly, although it may affect the few who deal with him very materially. It is most patently possible, however, for combinations to secure absolute control of industries which produce articles essential to the life and comfort of the community.

"The answer to the question suggested involves the consideration whether or not combinations which control industries do not become so impressed with a public character as to become in a sense **quasi**-public corporations—that is, corporations akin to telegraph, telephone and express companies. It is true that neither by charter nor otherwise are they granted any special privileges by the Legislature, any privileges which distinguish them from private corporations generally. As a rule, they have no power of eminent domain, nor are they granted any rights or privileges connected with streets or highways, and they are, in fact, simply huge private corporations. But express, steamship and elevator companies, for instance, have no power of emnient domain, and are granted no special privileges, and yet the nature of their business and their relations to the public are such that they are impressed with a **quasi**-public character and are not allowed to arbitrarily conduct their business without regard to the interests and welfare of the community and of those who deal with them. Suppose it appeared that all the producers of anthracite coal were so combined in a corporate combination that they absolutely controlled the market; is it possible the Courts would

view the combination as simply a private corporation and permit it to exercise the same arbitrary discretion over the output and prices that the private producer is permitted to exercise? The question whether or not the corporation is private or **quasi**-public is not to be determined by the provisions of its charter, but by the extent and character of its business. If a combination in process of time acquires control of an entire industry, the effect, as far as the public is concerned, is exactly the same as if the original charter of the corporation recited that the corporation was organized for the express purpose of securing the absolute control of the industry; if a charter contained such recital, the corporation should be held to be impressed with a public character, for the reason that the interest of the public in the creation and organization of such a corporation would far exceed the interest of the individuals participating therein."

How Far Do the Rights of Private Property Extend?

The conditions created by complainant in the sugar trade arouse the principle that, whenever property is used in such a way as to trench upon the rights of society, it becomes impressed with a public interest. For that principle we quote the following from James C. Carter's argument on behalf of the United States, before the Behring Sea Arbitration Tribunal:

> "Now, I have said all I intend to say for the purpose of showing how property, or private, individual property, has its origin; and **I now wish to say something as to the extent of the dominion over things which is implied by the term 'property.' And, first, it is not an absolute dominion. No man and no nation has, under the law of nature, or under the moral law, or in any view consistent with the moral**

order of the world, an absolute property in anything. It is at all times coupled with what may be called a trust for the benefit of mankind. There is no absolute right in any man to anything on the face of the earth. The earth and all its bounties were originally the gift of Almighty God to mankind in general—not to this nation, not to that nation, but to all men equally and alike; and that title, that beneficial title, belongs to all men without exception. Nor does it wholly disappear with the establishment of individual property. The custody of the thing is indeed given to individuals, or to particular nations; but it is at all times accompanied with a trust for the benefit of mankind, for whom it was originally designed, and for whom nature still designs it. Well, now, how is that trust worked out? How shall men all over the earth be enabled to enjoy this beneficial interest which nature originally intended them to have in all the production of the earth? It is through the instrumentality of commerce, which is another result of civilization. It is by means of the exchange of products between different regions of the earth and between different peoples, that all are enabled to enjoy the beneficial interest in the things of the earth which was originally designed by Providence. They could not, indeed, have these products except through the agency of individual property, or national property, and the instrumentality of commerce. Take these seals, for instance. They were intended and created for the benefit of mankind—for mankind in Europe as well as for the people living in the vicinity of the islands where they have their homes."

As to society's intervention into the owner's proprietary sphere, Mr. Carter says:

"And this shows the effort that society makes, not

only to prevent the destruction of property, but to increase it. We restock the rivers; we attempt even to restock the seas—and expend a great deal of money in these attempts. These are efforts, indeed, to preserve the sources of blessings which are in the course of extinction. And see how the use of private property is interfered with! Here is an individual; he may be an idiot, a lunatic, a drunkard, or a spendthrift, having a large property. Does society permit that man to deal with his property as he likes? No. He is likely to abuse it; he is likely to destroy it. He will not manage it well. It is taken out of his control and put into the hands of a trustee. Is it to benefit him particularly? Is it out of tenderness to the feelings, or the convenience of a worthless wretch like him? No; it is for the preservation of society."

When your Honors read how the property of the defendant is being administered, we ask that you consider how its conduct is imparted to its property, according to Savigny:

> **"Property, according to its true nature, is a widening of individual power. It is, as far as tangible things are concerned, an extension of the individual to some part of the material world, so that it is affected by his personality."**

And, according to the Court in **Columbian vs. State, 52 Am. St. Rep. 407 (28 L. R. A. 727 :**

> **"This is a proceeding against property, as well as against the corporation. The property itself is criminal, and can be used only for criminal purposes."**

And according to **Locke:**

"The fruit or version which nourishes the wild

> Indian * * * must be his, and so is his—i. e., a part of him, that another can no longer have any right to it * * *."

And according to **Von Ihering**:

> "In making the object my own, I stamped it with the mark of my own person; whoever attacks it attacks me; the blow struck it strikes me, for I am present in it. Property is but the periphery of my person extending to things."

The Fourteenth Amendment is a barrier against attacks, by legislation, upon the foundations of society. It is not the aegis, under which a school and den of immorality may proceed, with a **de facto** destruction of the foundations of society. As it was put by Mr. Justice Field, for the Court, in **Crowley vs. Christensen, 137 U. S. 86:**

> " * * * But the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good license to act according to one's own will. It is only itself, the greatest of all rights, is not unrestricted order and morals of the community. Even liberty freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law. The right to acquire, enjoy, and dispose of property is declared in the Constitutions of several States to be one of the inalienable rights of man. But this declaration is not held to preclude the Legislature of any State from passing laws respecting the acquisition, enjoyment and disposition of property. What contracts respecting its requisition and dispositions shall be valid and

what void or voidable, when they shall be in writing and when they may be made orally, and by what instruments it may be conveyed or mortgaged, are subjects of constant legislation. And, as to the enjoyment of property, the rule is general that it must be accompanied with such limitations as will not impair the equal enjoyment by others of their property. **Sic utere tuo ut alienum non laedas** is a maxim of universal application."

In **Leeper vs. Texas, 139 U. S. 468,** and in **Kemmler's case, 136 U. S. 436,** it was laid down, on the same lines:

> "The Fourteenth Amendment did not radically change the whole theory of the relations of the State and Federal Governments to each other, and of both governments to the people." * * * "It was not designed to interfere with the power of the State to protect the lives, liberties and property of its citizens, and to promote their health, peace, morals, education and good order. Barbier vs. Connolly, 113 U. S. 27, 31 (28:923, 925)."

Summary Process Is Not Violative of Due Process of Law.

It is objected that the summary process provided in Act 10 contravenes the requirements of due process of law.

As to the procedure side of this issue, it is easily disposed of by the authorities, which say that, there being provision for a notice and a hearing, all the requisites of due process of law are present.

Iowa Central R. R. vs. Ioawa, 160 U. S. 389.
L. & N. R. R. vs. Schmidt, 177 U. S. 230.
Standard Oil Co. vs. Missouri, 224 U. S. 287.
Hurtade vs. California, 110 U. S. 516.

As to the property side of this issue, it was said, in **Mugler vs. Kansas, 123 U. S. 623,** through Mr. Justice Harlan:

> "The principle that no person shall be deprived of life, liberty, or property, without due process of law, was embodied, in substance, in the Constitutions of nearly all, if not all, of the States at the time of the adoption of the Fourteenth Amendment; and it has never been regarded as incompatible with the principle—equally vital, because essential to the peace and safety of society—that **all property** in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."

Discussed from the angle of prohibiting certain uses of property, it was said, of the police power, in the same case:

> "'A prohibition upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property **for lawful purposes,** nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests."

That property may be brought under the ban of the law by the conduct of the owner, just as the owner may bring himself into the hands of the policeman; and that, in such cases, the property may be dealt with, summarily, is so well settled that we hesitate to cite authorities upon the

point; but the philosophic handling of the subject in **Spalding vs. Preston (Vermont), 50 Am. Decisions, 68,** induces us to select the following quotation from it:

> "**One who sets himself deliberately at work to contravene the fundamental laws of civil government—that is, the security of life, liberty, or property—forfeits his own right to protection, in those respects, wherein he was studying to infringe the rights of others.** The man who attempts the life or the liberty of another, forfeits for all time, all right to the protection of his own life, or person; and the person assailed may justly destroy both, if necessary, in his own defense, or if he may be fairly supposed to have esteemed it necessary under the circumstances. **So, too, if any member of the body politic, instead of putting his property to honest uses, convert it into an engine to injure the life, liberty, health, morals, peace, or property of others, he thereby forfeits all right to the protection of his bona fide interest in such property, before it was put to that use.**"
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> * * * * * * * * *
>
> "**Society, in all these cases and many others, has the right to anticipate, in order that it may prevent, the injury, which is thus threatened.** If it were not so, men, in a social state, would be far more powerless, for purposes of defense, than in a natural state. All will admit the right to restrain a madman, or a mad animal, from committing injury. And is the rational man, or the senseless material, which threatens crime or irreparable injury, less subject to control than the maniac, or his torch?"

This is in line with what Mr. Justice Brown said, for the Court, in **Lawton vs. Steele, 152 U. S. 133,** concerning the police power:

> "It is universally conceded to include everything

essential to the public safety, health and morals, **and to justify the destruction or abatement, by summary proceedings,** of whatever may be regarded as a public nuisance. Under this power it has been held that the State may order the destruction of a house falling to decay or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle, the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyances, and of interments in burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraints of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill-fame, and the prohibition of gambling houses and places where intoxicating liquors are sold. **Beyond this, however, the State may interfere whenever the public interests demand it, and in this particular a large discretion is necessarily vested in the Legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests.''**

The Statute Validly Provides Against the Capricious Discontinuance of a Public Utiltiy.

One of the monopolistic abuses that Act 10 was aimed at was the arbitrary stoppage of the refineries, which, by the abolition of all competing refineries, had become public utilities.

Chief Justice Hale, in his treatise, **De Portibus Maris,** and **Lord Ellenborough,** in **Aldnutt vs. Inglis, 12 East,**

527, laid it down that those who receive goods from the public must do so upon reasonable rates.

If the rates must be reasonable, so also must the **receiving of goods be reasonable**; and one who has made it impossible for others to receive the goods of the public is not at liberty to discontinue, capriciously, or in bad faith, a service which he has contrived shall be indispensable to the public.

There being a monopolized refinery, the public is as much interested in having the refinery operated as the owner. That interest is protected by Sections 8 and 9 of Act 10 in a reasonable way.

In **Eddy on Combinations, Section 1048,** the abstract question as to the validity of Sections 8 and 9 of Act 10 is thus asked and answered:

> "Can such combinations, in the exercise of the rights of their ownership, absolutely discontinue, if they see fit, the production of such goods and articles, or can they so arbitrarily advance prices as to levy tribute from the community, and for the time being make it utterly impossible for those who are compelled to deal with them to do business at a profit.
>
> "The answer to the question suggested involves the consideration whether or not combinations which control industries do not become so impressed with a public character as to become in a sense **quasi**-public corporation—that is, corporations akin to telegraph, telephone and express companies."

The subject is also discussed in **Montague on Trusts, p. 197:**

> "Even when no statutory regulation has been enacted, the common-law rule has come to be that persons professing such businesses have assumed toward

the public certain duties—**they must not retire from the businesses without due notice, they must serve all who ask to be served, with facilities adequate to reasonable demands, without discrimination in cost or quality of service, and at a reasonable price.** These principles, already familiar in their application to railroads, were given wide extension in 1876 by the Supreme Court of the United States, and were applied to the grain elevator business. 'Property becomes clothed with a public interest,' said the Court, 'when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created.' ''

Mr. Montague adds:

> ''Even **in the absence of statute** upon the subject, the **Courts** have come to **treat these businesses as public callings**; and where no charges have been fixed by the Legislature have, nevertheless, required that all charges be reasonable. * * * Already the common law, for public-service companies, to some minds, has assumed shape like this: **'Whenever a business upon which the community has come to depend for its welfare, becomes substantially and permanently controlled by an individual or a combination, such a business becomes a public calling.'** ''

There May Be More Than One Law Against Monopoly.

It is contended by the complainant that, because an Article of the Constitution of Louisiana prohibits monopolies, that a statute, such as Act 10, which regulates a

monopolized industry, is violative of the constitutional Article, because impliedly permissive of what the Constitution prohibits.

In the first place, the constitutional Article did not forbid the existence of an industry, because it had been monopolized! Hence, there is no conflict between Act 10 and the Constitution.

In the second place, a prohibition of an evil in a Constitution cannot be given the unwieldy and boomerang effect of likewise prohibiting efforts by the Legislature to reach the evil by regulating a business where it exists, notwithstanding the prohibition.

A State is not confined to one method of attacking an abuse; else it would not have been held, in **Carroll vs. Greenwich Ins. Co., 199 U. S. 401,** that the State might "apply and work out the policy of the general law in a particular case," and in **City of New York vs. Miln, 11 Pet. 102,** that, after denouncing an offense, and providing for its punishment, it is competent for the State to guard by anticipation against the commission of the offense.

In **Carroll vs. Greenwich Ins. Co., supra,** a special anti-trust law as to insurance companies was held valid, notwithstanding the existence of a general anti-trust statute.

Act 10 Does Not Provide for Dual Office-Holding.

Another question of strictly local law, which is of doubtful cognizance here, is whether Act 10 violates the Constitution of Louisiana, which ordains that there shall be no dual office-holding.

Act 10, it is urged, offends in this respect, by providing that the State Supervisor of Public Accounts shall be **ex-officio** State Inspector of Sugar Refining.

Upon this point we say:

First. We doubt the right of complainant to raise that question in the manner done here. The prohibition contained in the Constitution was enacted for the benefit of the State, and not for individuals, and none but the State should be permitted to raise that question. An officer should not be compelled to try an issue of this important nature in such a collateral way.

In **State vs. Gardner, 42 N. E. 999,** it was held that in a prosecution for offering a bribe to an officer, who was acting as such under a statute, the defendant who offered same could not question the constitutionality of same, the Court holding him to be a **de facto** officer, and that public policy defended him "against collateral attack, and that, therefore, the question of the constitutionality of the statute in question was not before the Court."

In a concurring opinion, Spear, Judge, cites in support of said doctrine **People vs. Weber, 86 Ill. 283; Leach vs. People, 122 Ill. 420; State vs. Carroll, 38 Conn. 449; Mapes vs. People, 69 Ill. 524.** In **Clark vs. Commonwealth, 29 Penn St. 129,** the prisoner had been convicted of murder, and the contention of the prisoner was that the Act of the Legislature creating the judgeship was unconstitutional. The Court held that the Judge was a Judge **de facto,** and, as against all but the Commonwealth, a Judge **de jure.** The Court said:

> "Can the rights and powers of a Judge **de facto,** with color of title, be questioned in any other form than by **quo warranto** at the suit of the Commonwealth? Assuredly not."

In **Campbell vs. Com., 96 Penn. St. 344,** where the accused was convicted of arson, two of the Judges, not

learned in the law, but who had been selected by the people and commissioned, sat with the presiding Judge and participated in the trial and sentence. The validity of the Court was questioned on the ground that the people had no power to elect associate Judges. It was held:

> "That they were Judges **de facto**, and, as against all parties but the Commonwealth, they were Judges **de jure**; and, having at least a colorable title to those offices, their title thereto could not be questioned in any other form than by **quo warranto at the suit of the Commonwealth.** * * * At a subsequent term, in an action in **quo warranto**, brought by the Attorney General, the associate Judges were ousted."

In **State vs. Brooks, 39 An. 817**, also cited in said concurring opinion, and which, in turn, cites other Louisiana cases, the Court held:

> "We do not desire to be understood, however, as intimating that a party charged with crime can be heard to raise an issue that the ministerial and other officers of court, actually and **de facto** acting as such, have no right to such offices. We should never get a criminal tried at that rate. We would commence with a kind of collateral **quo warranto** as to the Judge, and then go on down through the official roster of the court."

In **Ex parte Strang, 21 Ohio St. 610**, Strang had been convicted in the Police Court of Cincinnati and sought release by **habeas corpus** on the ground that the Police Judge, having been appointed by the Mayor under an unconstitutional statute, could not try and sentence him; but the Court held his conviction good, observing:

> "Assuming (without deciding the question) the

power of appointment thus conferred on the Mayor to be unauthorized by the Constitution, yet the person acting under such an appointment would be a Judge **de facto.**"

And that:

"The acts of the officer **de facto,** when questioned collaterally, are as binding as those of an officer **de jure.** * * * It is sufficient if he derives his appointment from one having colorable authority to appoint, and an Act of the General Assembly, though not warranted by the Constitution, will give such authority."

The same doctrine is recognized in **Norton vs. Shelby County, 118 U. S. 425,** where it is said:

"The doctrine which gives validity to acts of officers **de facto,** whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity for the protection of the public and individuals whose interests may be affected thereby. Officers are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices and in apparent possession of their powers and functions. For the good order and peace of society, their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined. It is manifest that endless confusion would result, if in every proceeding before such officers their title could be called in question."

As the State is not here complaining, it does not lie in the mouth of complainant to raise this question, nor would

it seem that the special tribunal provided for in the Judicial Code of the United States, with power to enjoin the execution of the laws of a sovereign State, was constituted to consider such a point as that the head of a department of the State was a **de facto** and not a **de jure** officer.

Second. We say that the Act really intended to shoulder on to the Supervisor of Public Accounts additional duties by making him **ex-officio** State Inspector of Sugar Refining, just, in Louisiana, as a Clerk of Court is made **ex officio** Registrar of Voters.

Act 10 does nothing, in so far as the Supervisor of Public Accounts is concerned, but impose additional duties upon him.

In **State ex rel. Ray vs. Blease, 79 S. E. 247**, the Legislature passed an Act for the exercise, by the State, of its option to call in and pay bonds issued by the State, the Act providing that the Sinking Fund Commissioners, composed of the Governor, State Treasurer, etc., should have authority to exercise the option, the Commission being authorized to hire a clerk. In a proceeding it was set up that the Act violated Section 2 of Article 2 of the Constitution of that State relative to holding two offices. The Court answered this by saying:

> "The answer to this objection is that membership in this Commission is not an office. It merely involves the discharge of duties imposed by law upon the various officers who compose the Commission—duties which are, therefore, merely incident to their respective offices."

In **State ex rel. Crawford vs. Anderson, 155 Iowa, 271 (136 N. W. 128; A. & E. Ann. Cas. 1915A, 523)**, it was said

that the test under the Anti-Dual Office-Holdings Acts was:

> "Whether there is a subordination of one [office] to the other, or an inherent inconsistency between the duties of the two offices, **and the question is one which must be largely determined from a consideration of the duties of each with regard to the public interest.**"

It was, undoubtedly, this distinction which governed the Louisiana Legislature in imposing the duties of Inspector of Sugar Refining upon the Supervisor of Public Accounts. The duties of both are identical—the supervising of accounts; and the super ising of the business of sugar refining is nothing more nor less than an added department to the general supervising of public accounts. The laws look to substance, rather than to form. It cannot be denied that the Legislature could, in form, have added such a department to the office of Supervisor of Public Accounts; and there can be no valid objection to that being done, as in this Act it is done, in substance.

In notes upon the **Anderson case, supra**, in **A. & E. Ann. Cas. 1915A, 528**, the similar case of **State vs. Carter, 174 Ala. 266 (56 So. 974)**, is analyzed, and, concerning it, this is said:

> "Although the Constitution prohibits the holding by one person of two offices at the same time, a statute imposing the duties of a particular office on the occupant of another office is not necessarily in conflict with the prohibition. * * *
>
> "This [Alabama] Act created a separate and distinct inferior court, as expressly authorized by the Constitution; but it did not thereby create any additional office, State, county, or municipal. It merely

provided, in terms, that other officers—the Judge of the Inferior Criminal Court of Mobile County, the Clerk of such court, and the Sheriff or the Coroner of such county—should perform and discharge the duties and functions pertaining to this new court thereby created. It merely conferred new or additional powers and duties upon the officers named. * * *

"It was, in effect, a consolidation of courts, rather than a multiplication thereof. The Constitution does, in effect, inhibit multiplicity of offices, without multiplicity of office-holders—that is, it inhibits one person to hold two or more offices of profit and trust under the same State Government at the same time; but it does not forbid the consolidation of two or more offices, nor does it prohibit the Legislature from imposing additional duties upon, or clothing with added powers, existing officers, nor from withdrawing certain powers and duties from one officer and transferring same to another (with certain limitations or exceptions not necessary to here mention). * * *

"In State vs. Hart (Ind.), 105 N. E. 149, it was held that a statute permitting the appointment of a County Surveyor to the office of County Highway Superintendent did not violate Section 9 of Article 2 of the Constitution, forbidding any one to hold more than one lucrative office at the same time. The Court said: 'It is not necessary to discuss at length the questions raised by appellee of the constitutionality of the provision which permits the appointment of the Surveyor to the office of Superintendent. But it may be said that there can be no doubt of the authority of the Legislature to invest such an officer as County Surveyor with additional administrative duties without violating Section 9 of Articl 2 of the Constitution.' "

So common is it for new duties to be added to an exist-

ing office, without offending the Dual Office-Holding Article of the Constitution in question, that a session of the Legislature is rarely ever held without the designation of some State officer, as charged, **ex-officio** with the duties of some other office; and there can be no explanation of such legislation except on the ground that the Legislature is not prohibited from merging offices, where they are compatible. Going back over the statutes of Louisiana for only ten years back, we find the following designation of one official as **ex-officio** incumbent of some other office:

The Registrar of the Land Office is **ex-officio** Commissioner of Forestry.—Act 113 of 1904, and Act 261 of 1910.

The Governor, the Lieutenant Governor, the Auditor, the Secretary of State, the Attorney General and the Speaker of the House constitute, **ex-officio**, the State Board of Liquidation.—Act 20 of 1906.

The Registrar of Voters is, in all the country parishes, **ex-officio** Supervisor of Elections.—Act 99 of 1908.

The Civil Sheriff and the Registrar of Voters are, in New Orleans, **ex-officio** Supervisors of Elections.—Act 99 of 1908.

The Governor and the Secretary of State constitute, **ex-officio**, the State Printing Board.—Act 184 of 1908.

The Superintendent of Public Schools is, **ex-officio**, Treasurer of all school funds.—Act 17, Extra Session of 1907.

The Supervisor of Public Accounts is, **ex officio**, Sheriff in all cases of vacancy.—Act 251 of 1910.

The Clerk of Court is, **ex officio**, Registrar of Voters.—Act 212 of 1912.

The Secretary of State is, **ex-officio**, member of the State Fire Insurance Board.—Act 174 of 1912.

The Governor and the Attorney General are, **ex-officio,** constituents of the Tuberculosis Commission.—Act 161 of 1912.

The Governor and the Superintendent of Public Education and the Attorney General are, **ex-officio,** constituents of the State Board of Education.—Act 214 of 1912.

The Lieutenant Governor and the Speaker of the House are, **ex-officio, constituents** of the State Tax Commisson.—Act 110 of 1912.

The Governor, the Secretary of State and the Auditor constitute, **ex-officio,** the State Printing Board.—Act 141 of 1912.

The Governor, the Auditor, the Treasurer and the Supervisor of Public Accounts constitute, **ex-officio,** the State Board of Apportionment.—Act 246 of 1913.

If the prohibition against dual office-holding is interpreted in any other way than as forbidding the merger of incompatible offices, it would be a serious drawback to the efficient administration of public affairs.

Third. If the point concerning dual office-holding is considered important, we would point out that that feature of the Act is a mere incidental, and almost immaterial, one, as compared witn its general scope and tenor; hence, it would be necessary to inquire whether, if that feature of the Act be void, the balance could stand. If the designation of the Inspector of Sugar Refining by the Legislature is invalid, the Act is still enforceable, either by taking that feature of it as not written, and thereby devolving the appointment of the inspector upon the Governor, or by taking the Act as having independent provisions which are enforceable without any inspector at all.

If the provision making the Supervisor of Public Accounts **ex-officio** State Inspector of Sugar Refining be taken as not written, the Act should be taken as creating the office of Inspector of Sugar Refining without providing for the filling of the office; and, in that aspect, an original vacancy would exist, which, by the Constitution of Louisiana, must be filled by the Governor.

Articles 71 and **72** of the **Constitution of Louisiana** give the Governor power to fill, by appointment, all vacancies. They read as follows:

> "Art. 71. He shall nominate and, by and with the advice and consent of the Senate, appoint all officers whose offices are established by this Constitution and whose appointments, or elections, are not herein otherwise provided for; provided, however, that the General Assembly shall have the right to prescribe the mode of appointment or election to all offices created by it."
>
> "Art. 72. The Governor shall have the power to fill vacancies that may happen during the recess of the Senate, in cases not otherwise provided for in this Constitution, by granting commissions which shall expire at the end of the next session; but no person who has been nominated for office and rejected shall be appointed to the same office during the recess of the Senate. The failure of the Governor to send into the Senate the name of any person appointed for office, as herein provided, shall be equivalent to a rejection."

It is well settled that, where a statute creates an office, without filling it, a vacancy arises, which must be filled in the same manner as other vacancies.

Walsh vs. Commonwealth, 89 Pa. 419 (33 Am. Rep. 771).
State vs. Askew, 2 S. W. 349 (48 Ark. 82).
State ex rel. Brown vs. McMillan, 18 S. W. 784 (108 Mo. 153).
State vs. Irwin, 5 Nev. 111.
Gormley vs. Taylor, 44 Ga. 76.
Words and Phrases, p. 7261.

As to whether the Act can stand if the provision as to the Supervisor of Public Accounts is eliminated, it is apparent that the object of the law was to regulate the business of sugar refining, and that the Supervisor of Public Accounts is one of the minor means to the accomplishment of that end.

The Fee for Inspecting Sugar Is Not a Tax, and Is Not Void for Want of Uniformity.

It is objected that no provision is made in Act 10 for actual or visual inspection of sugar.

It is plain that it is the business of refining sugar—its buyings, its sellings and its tradings—which the lawmaker has found it necessary to watch. The quality of the sugar has nothing to with the case.

Act 10 Does Not Delegate Any Legislative Power to the State Inspector of Sugar Refining.

Section 6 of the Act authorizes the State Inspector of Sugar Refining to find what evils of monopoly need regulation, and to then promulgate such regulations as may be conducive to that end. The language of the clause giving this authority is as follows:

"* * * he may, also, formulate and promul-

> gate, from time to time, in the same way, such other reasonable regulations, affecting any branch of the business of sugar refining, as may be conducive to the public interest, and to the prevention of monopoly in the business or refining sugar, or the protection of the public from the consequences thereof."

The Act confers executive powers, only, upon the Inspector of Sugar Refining. He is to adopt such regulations as, in the varying and complicated aspects of an enormous business, may be necessary to carry out the declared and established policy of the Legislature. That is a broad and sweeping power, but it is, nevertheless, an executive power, and not a legislative one. In no event, however, could the, as yet, unexercised power of the Inspector be a ground for declaring the Act itself void. If the Inspector transcends the bounds of the authority which may be constitutionally delegated to him, it will be time enough then to declare what he does to be void. Neither the partial invalidity of the Act nor the total invalidity of any regulation adopted in pursuance of it could render the Act itself void.

Concerning the extent to which executive powers may be delegated, it was held, in **Zakonaite vs. Wolf, 226 U. S. 272,** that life, liberty and property are not taken without due process of law, where it is the duty of the subordinate officers of the Department of Commerce and Labor to pass upon the right of a person to remain in the United States.

In **Bradley vs. Richmond, 227 U. S. 477,** the Court said on the subject, through Mr. Justice Lurton:

> "This Court will not interfere because the States have seen fit to give administrative discretion to local boards to grant or withhold licenses or permits to

carry on trades or occupations or perform acts which are properly the subject of regulation in the exercise of the reserved power of the States to protect the health and safety of its people."

In **United States vs. Grimaud, 220 U. S. 506,** it was held that legislative power was not unconstitutionally delegated to the Secretary of Agriculture by the provisions of the Forest Reserve Act, giving him the power to promulgate the extensive code of rules and regulations covering forest reservations. In the course of its opinion, Mr. Justice Lamar said, for the Court:

> "Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power."
>
> Citing **Butte Water Co. vs. Baker, 196 U. S. 126.**

Concerning a statute fixing a rule, and leaving it to administrative officers to apply the rule, by regulation, as Section 6 of Act 10 does, it was said, in **Plymouth Coal Co. vs. Pennsylvania, 232 U. S. 543,** by Mr. Justice Pitney for the Court:

> "The Legislature has not defined with precision the width of the pillar, and it is very properly admitted that, in the nature of things, this would have been impossible, because the width necessary in each case must be determined with reference to the situation of the particular property. From this it necessarily results that it was competent for the Legislature to lay down a general rule, and then establish an administrative tribunal with authority to fix the precise width or thickness of pillar that will suit the necessities of the particular situation, and constitute a compliance with the general rule. United States vs.

Grimaud, 220 U. S. 506, 517-522 (55 L. Ed. 567-569; 31 Sup. Ct. Rep. 480). Administrative bodies with authority not essentially different are a recognized governmental institution. Commissions for the regulation of public-service corporations are a familiar instance. Interstate Commerce Commission vs. Cincinnati, N. O. & T. P. R. Co., 167 U. S. 479, 495 (42 L. Ed. 243, 251; 17 Sup. Ct. Rep. 896). And it has become entirely settled that powers and discretion of this character may be delegated to administrative bodies, or even to a single individual. Re Kollock, 165 U. S. 526, 536 (41 L. Ed. 813, 816; 17 Sup. Ct. Rep. 444); Wilson vs. Eureka City, 173 U. S. 32 (43 L. Ed. 603, 19 Sup. Ct. Rep. 317); Gundling vs. Chicago, 177 U. S. 183, 186 (44 L. Ed. 725, 728; 20 Sup. Ct. Rep. 633); Fischer vs. St. Louis, 194 U. S. 361, 371, 372 (48 L. Ed. 1018, 1023, 1024; 24 Sup. Ct. Rep. 673); Jacobson vs. Massachusetts, 197 U. S. 11, 25 (49 L. Ed. 643, 649; 25 Sup. Ct. Rep. 358; 3 An.. Cas. 765); New York ex rel. Lieberman vs. Van De Carr, 199 U. S. 552, 560, 562 (50 L. Ed. 305, 310, 311; 26 Sup. Ct. Rep. 144)."

In **Red "C" Oil Mfg. Co. vs. Board, 222 U. S. 378 (56 L. Ed. 246)**, it was said, through Chief Justice White, concerning a similar statute:

"The remaining contention is that the Act is repugnant to the State Constitution, because it attempts to delegate to the Board of Agriculture the exercise of legislative powers. The legislative requirements was that the illuminating oils furnished in North Carolina should be safe, pure, and afford a satisfactory light, and it was left to the Board of Agriculture to determine what oils should measure up to these standards. We think a sufficient primary standard was established, and that the claim that legislative powers were delegated is untenable. But-

terfield vs. Stranahan, 192 U. S. 492 (48 L. Ed. 534; 24 Sup. Ct. Rep. 349); Union Bridge Co. vs. United States, 204 U. S. 364 (51 L. Ed. 523; 27 Sup. Ct. Rep. 367); St. Louis, I. M. & S. R. Co. vs. Taylor, 210 U. S. 281 (52 L. Ed. 1061; 28 Sup. Ct. Rep. 616); United States vs. Grimaud, 220 U. S. 506 (55 L. Ed. 563; 31 Sup. Ct. Rep. 480)."

In **Interstate Commerce Commission vs. Goodrich Transit Co., 224 U. S. 212 (56 L. Ed. 737)**, it was said, through Mr. Justice Day:

"The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress. This rule has been frequently stated and illustrated in recent cases in this court, and needs no amplification here. Butterfield vs. Stranahan, 192 U. S. 470 (48 L. Ed. 525; 24 Sup. Ct. Rep. 349); Union Bridge Co. vs. United States, 204 U. S. 364 (51 L. Ed. 523; 27 Sup. Ct. Rep. 367); United States vs. Grimaud, 220 U. S. 506 (55 L. Ed. 563; 31 Sup. Ct. Rep. 480).

"In Section 20, Congress has authorized the commission to require annual reports. The Act itself prescribes in detail what those reports shall contain. The commission is permitted, in its discretion, to require a uniform system of accounting, and to prohibit other methods of accounting than those which the commission may prescribe. In other words, Congress has laid down general rules for the guidance of the commission, leaving to it merely the carrying out of details in the exercise of the power so conferred. This, we think, is not a delegation of legislative authority."

Inasmuch as the State Inspector of Sugar Refining has not promulgated any regulations, it cannot be decided, now, whether they constitute legislation, or whether they are mere executive applications of a settled legislative policy.

The Prohibition in Act 10 Against Buying Sugar on Ex Parte Tests Is a Valid Police Regulation.

The Act specifies some of the practices of monopoly which are most commonly injurious, and prohibits them. This prohibition is assailed as infringing upon the liberty of contract.

It has been found necessary, in Louisiana, to protect the rights and liberties of the general public, in the sugar trade, by limiting the power of the monopolist to defraud the sellers of sugar, through **ex parte** tests of the quality of the sugar, and through the fixing of arbitrary weights of the packages in which the sugar is sold.

The interference of the police power is as allowable, and as needed, here as in the regulation of the weight of loaves of bread, in **Schmidinger vs. Chicago, 226 U. S. 578,** concerning which it was said, by Mr. Justice Day, in deciding the case:

> "Laws and ordinances of the character of the one here under consideration, and tending to prevent frauds, and requiring honest weights and measures in the sale of articles of general consumption, have long been considered lawful exertions of the police power. McLean vs. Arkansas, 211 U. S. 550 (53 L. Ed. 320; 29 Sup. Ct. Rep. 206); Freund Pol. Power, Secs. 274, 275. Laws prescribing standard sizes of loaves of bread, and prohibiting, with minor excep-

tions, the sale of other sizes, have been sustained in the courts of Massachusetts and Michigan. Com. vs. McArthur, 152 Mass. 522 (25 N. E. 836); People vs. Wagner, 86 Mich. 594 (13 L. R. A. 286; 24 Am. St. Rep. 141; 49 N. W. 609)."

The Penalties of Act 10 Are Not Unreasonable.

The penalty provisions of Act 10 fall within the class of which **Waters-Pierce Oil Company vs. Texas, 212 U. S. 113,** and **Wadley Southern R. R. vs. Georgia, 235 U. S. 651,** are examples, and not within the class condemned in **Missouri P. R. Co. vs. Tucker, 230 U. S. 340; Ex parte Young, 209 U. S. 123,** and **Willcox vs. Consolidated Gas Company, 212 U. S. 19.**

As to the alleged unreasonableness of the penalties themselves, they are less, by half, in their maximum, than the penalties in the **Waters-Pierce Oil Company** and **Wadley Southern Railroad Company cases.**

As to the reasonableness of the penalties, in relation to complainant's business, it will be seen, from the bill, and exhibits, that complainant handles over 300,000 tons of sugar in Louisiana annually, of a value not far from four cents a pound, or $80 a ton. Its business in the State amounts, therefore, to over $20,000,000 yearly. Penalties which may range from $50 to $2,500 a day are not disproportionate to the harm that monopoly may do, or even to the size of complainant's business.

Again, the statute provides for an extraordinarily speedy hearing of all questions arising under it. Under Section 12, any question of law must be taken up in preference over all business, and must be decided by the Judge of first instance within ten days after submission.

Either party cast must appeal within five days; the appeal must be lodged in the appellate court within ten days, and, in the appellate court, the case must be decided within forty days. These provisions remove any possibility of the complainant's property being eaten up in fines, or of complainant being intimidated into submission to the law, in the manner reprobated in **Cotting vs. Godard, 183 U. S. 83.**

The provisions for speedy judicial hearing rather put this case in line with **Wadley Southern R. R. Co. vs. Georgia, 235 U. S. 651,** where it was said that a safe opportunity to obtain a judicial review of any alleged hardships would deprive even an exorbitant penalty of its menace, or of its confiscatory effect.

Besides, since the enactment of Article 226 of the Federal Judicial Code, the dilemma of being forced "to obey what was finally held to be a void order, or disobey what may ultimately be held to be a lawful order," does not so readily arise, as was noticed in **Wadley S. R. Co. vs. Georgia, supra.**

Again, the cases of **Missouri P. R. Co. vs. Tucker; Ex parte Young,** and **Willcox vs. Consolidated Gas Company, supra,** were decided on the theory that the complainants in those cases were under a charter obligation to do business at regular fixed rates, and that they were put under coercion, by the penalty statute, to do business at the rates fixed by the statute. This created a sort of nut-cracking process, which was inherently unfair. There is nothing of the kind here.

As to the penalty against buying sugar on **ex parte** tests of quality, and on false weights, it stands on quite a different basis than the penalties which were held in-

valid in **Missouri P. R. Co. vs. Tucker; Ex parte Young,** and **Willcox vs. Consolidated Gas Company, supra;** because, in those cases, the penalties were held unreasonable on account of the orders they were intended to enforce being of doubtful validity, whereas, here, we submit that there cannot be any reasonable ground of attack upon a penalty imposed upon those who, in a monopolized market, buy, upon **ex parte** tests and upon false weights, commodities which must be tested and weighed before their value can be ascertained.

It was the inherent unreasonableness, either patent or latent, of the orders contested in the **Missouri Pacific, Young,** and **Consolidated Gas Company cases,** which influenced those decisions. Here, the police regulation, against what is, or what may easily be, cheating, is inherently reasonable.

The considerations which governed the result in the **Waters-Pierce Oil Company,** and **Wadley Southern R. Company cases,** seem conclusive here. At any rate, the penalties are detachable, and do not at all involve the validity of the scheme of regulation in Act 10. Upon the point of the separableness of invalid penalties from the balance of a statute, which remains valid, we again cite the **Consolidated Gas Company case, supra.**

The Defendant's Corrupting Influence.

The injury to the State by this monopoly has been, and is, less important on the side of commerce, great as it is, than upon that of morals. We ask your Honors to read, in the record, how respectable citizens became the tools of the defendant; how others bought the right to sell their sugar by first selling themselves, and betraying their

fellow-planters; how loyalty and courage and independence were reduced, along with competition, as far towards zero as the power of the defendant could drive them; and we then ask you to consider how far the operations of defendant have verified the theory as to the chief evils of monopoly expressed by President Cleveland in his Message to Congress on December 7, 1896:

> "Their tendency is to crush out individual independence and to hinder or prevent the free use of human faculties and the full development of human character. Through them the farmer, the artisan and the small trader is in danger of dislodgement from the proud position of being his own master, watchful of all that touches his country's prosperity, in which he has an indvidual lot, and interested in all that affects the advantages of business of which he is a factor, to be relegated to the level of a mere appurtenance to a great machine, with little free will, with no duty but that of passive obedience, and with little hope or opportunity of rising in the scale of responsible and helpful citizenship."

The Anti-Trust Laws Need Reinforcement from the Equity Maxim Prohibiting Attack from Unclean Hands.

When the monopolies of Queen Elizabeth were first objected to, the Queen made an edifying spectacle of yielding to the popular clamor for their abolishment, and the House of Commons received her gracious concession with an emotion out of all proportion to the importance of the event, as seen in the light of the subsequent course of trade in England. **Hume, in his History of England, Vol. 4, Chap. 44,** tells how the Queen, on realizing the

odiousness of the monopolies, sent for the Speaker, and desired him to acquaint the House that she would immediately cancel them, and how the House was overcome with the message:

> "The House was struck with astonishment and admiration and gratitude at this extraordinary instance of the Queen's goodness and condescension. A member said, with tears in his eyes, that if a sentence of everlasting happiness had been pronounced in his favor he could not have felt more joy than that with which he was at present overwhelmed. Another observed that this message from the sacred person of the Queen was a kind of gospel of glad tidings, and ought to be received as such, and be written in the tablets of their hearts."

These monopolies were by patent. They were succeeded, in full estate, by others which had no patent, except such as resulted from decisions like that rendered by the House of Lords in 1892, in the case of **Mogul Steamship Company vs. McGregor, 23 Q. B. 598.** There has been a flood of anti-trust legislation since the House wrote it on the tablets of their hearts that Queen Elizabeth had abolished the monopolies. Their effect is thus described in **Ely on Monopolies and Trusts, p. 243:**

> "If there is any serious student of our economic life who believes that anything substantial has been gained by all the laws passed against trusts, by all the newspaper editorials which have thus far been penned, by all the sermons which have been preached against them, by all the speeches of the politicians denouncing them, this authority has yet to be heard from. Forms and names have been changed in some instances, but the dreaded work of vast aggregation of capital has gone on practically as heretofore."

Such, too, is the view of Mr. Beck, the learned chief counsel for complainant, who, in discussing the Sherman Law before the American Academy of Political and Social Science, said, as reported in the Annals of the Society for 1911:

> "The Sherman Law in its practical enforcement has been, notwithstanding the high purposes, the great skill, and the real effort of the various attorneys general who have had occasion to administer it, little less than a delusion. It has accomplished practically nothing."

The underlying idea in the complainant's case is that all these anti-trust statutes are impertinent intermeddlings with natural laws, impossible of enforcement. True it is that it is impertinence, even in the fiat of a State, to seek to overcome natural laws, but we cannot accept the monopolist's classification of frauds and conspiracies as being natural laws, before which legislative and judicial fulminations are peevish bulrushes in the current of the Nile.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 847.

WILLIAM N. McFARLAND, SUPERVISOR PUBLIC ACCOUNTS OF LOUISIANA, ET ALS., APPELLANTS,

versus

THE AMERICAN SUGAR REFINING COMPANY, APPELLEES.

ADDITIONAL AUTHORITIES FOR APPELLANTS.

Interstate Commerce.

Baltic Mining Company vs. Massachusetts, 231 U. S., 68.
Brodnax vs. Missouri, 219 U. S., 285.
Standard Oil Co. vs. Tennessee, 217 U. S., 413.
Hammond Packing Company vs. Arkansas, 212 U. S., 335.
Sligh vs. Kirkwood, 237 U. S., 52.
Savage vs. Jones, 225 U. S., 503.

Rule of Evidence.

Jones vs. Brim, 165 U. S., 180.

Classification.

Pullman Car Co. vs. Knott, 235 U. S., 24.

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